A Review of Key Elements of the DOD’s Final Rule on Commercial Item Determination

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Objectives

• FAR Commercial Item Definition
• Defense Contract Management Agency (DCMA) Commercial Item Determination (CID) Approach
• DFARS and NDAA’s perspective and objective to reach a broader market
• Opportunities for nontraditional defense contractors under the DFARS regulations
• Impact on civilian Federal agency interpretation of commercial items
• Recent 809 Panel’s bold suggestions on commercial approach to the market
Commercial Acquisition Challenges

What’s “commercial”?

What’s a “fair and reasonable” price?
Commercial Item Definition (FAR 2.101)

Commercial item definition contains 8 specific areas:

1. Simplified definition of an established marketplace commercial item:
   Commercial items include any item of a type customarily used by the general public, or by nongovernmental entities, for purposes other than governmental purposes, and has been sold, leased, or licensed to the general public, or has been offered for sale, lease, or license to the general public (see FAR 2.101).

2. If it meets one, than any item that evolved through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;
Commercial Item Definition (FAR 2.101)

3. An established or evolved commercial item that was modified using customarily available modifications “of a type” in the commercial marketplace; or minor modifications “of a type” not customarily available in the commercial marketplace made to meet Federal Government requirements.

4. Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;
Commercial Item Definition (FAR 2.101)

- Established Marketplace
- Evolved to be Available in Commercial Marketplace
- Modification that is Customarily Available
- Minor Modifications, Not Customarily Available
Commercial Item Definition (FAR 2.101)

5. Installation services, maintenance services, repair services, training services, and other services if:
   i. Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
   
   ii. The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;
Commercial Item Definition (FAR 2.101)

6. **Services of a type** offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

   i. **"Catalog price"** means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

   ii. **"Market prices"** means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.
7. Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

8. A **nondevelopmental item**, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Added by the NDI Definition

Parent Company

Subsidiary
Division A
Division B

Other Non-Federal Government Sales

State
Counties
Foreign
Commercial Item Definition (FAR vs. DFARS)

Why do we even need a DoD supplement to the FAR’s well defined “commercial item” and, FAR Part 12 - Acquisition of Commercial Items?

Reduce the confusion around the requesting for [uncertified cost information](#), where price information is not adequate for evaluating the reasonableness of price. The FAR does not go far enough to allow the contracting officer to determine whether the price is fair and reasonable.
Final Rule Amending DFARS Effective January 31, 2018

- National Defense Authorization Acts (NDAA) for Fiscal Years 2013, 2016, and 2018 relating to commercial item acquisitions
- This rule provides guidance to contracting officers in three related areas:
  
  - Making Price Reasonableness Determinations
  - Promotes Consistency in making Commercial Item Determinations
  - Expands Opportunities for Nontraditional Defense Contractors
Evolution of the DFARS Commercial Items Argument

- On August 3, 2015, DoD published proposed DFARS rule 2013-D034 to implement the requirements of section 831 of the NDAA for FY 2013.
- Before this rule was ever finalized, many practitioners voiced their concerns to the Congress that resulted in NDAA 2016 (November 25, 2015) directing DoD to address additional concerns.
DFARS – Final Ruling

- There were 11 significant changes
- Public Comments were summarized into 38 areas
- Implements 3 NDAA’s consisting of 6 sections:
  - FY 2013 – Section 831;
  - FY 2016 – Sections 851, 853, 855, 857; and,
  - FY 2018 – Section 848.
- Amends 6 Parts in 48 CFR Chapter 2:
  - 202 - Definitions of Words and Terms
  - 212 - Acquisition of Commercial Items
  - 215 - Contracting by Negotiation
  - 234 - Major System Acquisition
  - 239 - Acquisition of Information Technology
  - 252 - Acquisition of Information Technology
Five Years of NDAA Changes

- **NDAA 2013**
  - ✓ Created a cadre of experts for commercial acquisition, led to CIG

- **NDAA 2016**
  - ✓ Restricted the PCO’s ability to change a commercial decision; HCA to overturn
  - ✓ Reliance on prior Government prices paid
  - ✓ Added scrutiny to convert from a FAR 12 to FAR 15
  - ✓ Required a database for recommendations and determinations of commerciality

- **NDAA 2017**
  - ✓ Emphasized market research for price analysis
  - ✓ Enforced/changed the build of a central database
  - ✓ Added many commercial related pilot programs
• Changed the word “data” has been changed to “information” where appropriate throughout the rule.

Why is changing the word “data” for “information” a significant amendment to the regulations?
DFARS – Prior Commercial Item Determination

• DFARS has been revised to state that a contracting officers may presume that a prior commercial item determination, or a determination that overturned a prior commercial item determination, shall serve as a determination for subsequent procurements of such item. That determination made by:
  - Military department,
  - Defense agency, or
  - Another component of DoD

What about civilian agency determination?
DFARS – Prior Commercial Item Determination

• What happens if the contracting officer does not make the presumption that a prior commercial item determination is valid, and instead chooses to proceed with a procurement of an item previously determined to be a commercial item using procedures other than the procedures authorized for the procurement of a commercial item?

• KO shall request a review of the commercial item determination by the head of the contracting activity that will conduct the procurement. Who shall:
  - Confirm prior determination was appropriate, or
  - Issue a determination that the prior use of FAR Part 12 procedures was improper
DoD Guidebook for Acquiring Commercial Items, Part A: Commercial Item Determination

• DOD guidebook for commercial was released 31 January
• It is a guide, not policy, not regulation
• Created by DoD Leaders, DPAP, Commands, and the Commercial Item Group
Collaboration On Commercial Item And Price Reasonableness Determinations

- **Comment:** One respondent recommended that the rule codify and provide the opportunity for offerors to collaborate with DoD's cadre of experts prior to a final decision by the contracting officer on commercial item and price reasonableness determinations. (83 FR 4431)

- **Response:** DoD concurs with the statement that an open exchange of information by both parties leads to more timely commercial item determinations and price analysis… The cadre regularly engages with offerors to obtain an understanding of proposed commercial items and associated pricing. DCMA is also facilitating collaboration with offerors through commercial item memorandums of agreement with interested companies.
Collaboration With Industry

• DCMA piloting memorandum of agreements (MOAs) with contractors to create a common framework
• These MOAs are agreements between DCMA and prime contractors on how to work together to streamline government reviews of commercial item pricing. Key features:
  • Scope usually not limited to a single program or sale
  • Does not limit or usurp authority of Contracting Officer to make commercial item determinations
  • Can be cancelled unilaterally by either party at any time
Commercial Item Definition (FAR 2.101)

Is there a difference between selling items versus selling services, as defined in the FAR?

- If so, what is the difference?
- Does the FAR mention “commercial services?”
- Does it even matter?
Prime Responsibilities Over Subcontractor’s CID

• Primes are responsible to determine whether a particular sub’s supply or service meets the definition of a commercial item (DFARS 244.402)
  
  (a) Contractors shall determine whether a particular subcontract item meets the definition of a commercial item...Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR Part 10.

• Primes accessibility to DoD robust database of commercial item determinations list or can a Prime contribute to the list
Prime Responsibilities Over Subcontractor’s CID

• Procurement files must adequately substantiate the market research (FAR Part 10) in commercial item determination (CID)
  - Standard forms
  - Sufficient Information
  - Time Elapsed
  - Quantities Purchased

• Relevant sales data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets or other adjustments). DFARS 215-401
The CIG can assist with reviews of contractor purchasing systems to determine the adequacy of the contractor’s processes for

- Documenting commercial item determinations,
- Performing market research, and
- Determining fair and reasonable pricing.
**DFARS – Nontraditional Defense Contractors (NDC)**

- Proposed amendment to the DFARS 202.101, Definitions (Federal Register 53104, Aug. 11, 2016)

  *Nontraditional defense contractor (NDC)* means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to:

  [1] full coverage under the cost accounting standards [CAS]…,

  [2] for at least the 1-year period preceding the solicitation of sources by DoD...

- This definition should increase the number of possible (sub)contractors participation. Does it???
DFARS – Nontraditional Defense Contractors (Pending DFARS 212.102)

• Supplies and services provided by NDC may be treated as commercial items (10 U.S.C. 2380A).

• This permissive authority is intended to enhance defense innovation and create incentives for cutting-edge firms to do business with DoD.
DFARS – Nontraditional Defense Contractors (DFARS 212.102)

- It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of NDC even though they have been established under traditional defense contractors.

- The decision to apply commercial item procedures to the procurement of supplies and services from NDCs does not constitute:
  1. A requirement for a commercial item determination (CID); and
  2. It does not mean the item is commercial.
DFARS – Nontraditional Defense Contractors (Pending DFARS 212.102)

• What are the opportunities for NDCs?

• What industries are DoD targeting?

• Will participation increase with the change in the DoD regulations? Or are they the same players?

• Should NDC be concerned with entering the DoD arena?
Non-DoD Agencies Commercial Item Determination

- Impact on civilian agencies’ interpretation of commercial items
- Will the new definition and positions taken by DoD be accepted by other agency?
- Section 853 NDAA for FY 2016 provides that contracting officer shall consider evidence provided by an offeror of recent purchaser prices paid by the Government for the same or similar commercial items when established price reasonableness, subject to certain conditions. (Fed Reg. 53103, Aug 11, 2016)

✔ Does this include Non-DoD agency?
Mission:

Provide acquisition insight for the integration of commercial products and services within DoD to streamline procurement and ensure warfighters receive cutting-edge technology at fair and reasonable prices

Commercial Item Group Launch

- We are here to help
  - Consistency
  - Streamlined
  - New technology
  - Price-only analysis

Mission: Provide acquisition insight for the integration of commercial products and services within DoD to streamline procurement and ensure warfighters receive cutting-edge technology at fair and reasonable prices
CIG Teams & Locations

Denver, CO
Markets: Space (Spacecraft and Lift), C4I (Systems, Cyber and Services), UAS

Indianapolis, IN
Markets: Automotive, Aeronautics, Aircraft Engines

Boston, MA
Markets: Services (MRO), Chemicals and Materials

Philadelphia, PA
Markets: Naval Transport & Equipment, Troop Supply (Shelters, Personal Equipment)

Phoenix, AZ
Markets: Heavy Machinery, Missiles

St. Petersburg, FL
Markets: Vehicles, Weapons, Ammo

CIG staff

Price/Cost
Analysts: 37
Engineers: 20
Management
Analysts: 1
Director: 1
DCMA's Commercial Item Database

- Currently maintained in Excel format
- Tens-of-thousands of parts – and growing
- Not all-inclusive (but we’re working on that)
- Sources of data:
  - Commercial Item Determinations by Procuring Contracting Officers
  - Commercial Item Recommendations by CIG personnel
  - Others
- Need information? Contact commercial@dcma.mil
Market Research

- There is no single website, person, or tool that has all the answers
- There is no checklist or template, since each part or service has its own unique circumstances
- Be creative, use your own best judgment
- Combine all sources of information to paint a complete picture, and…

…document it!
How DCMA does it, what they do to Accomplish it!

• First, understand the requirements
  – Know the specifications for form, fit, and function
  – Know any special military requirements such as paint, labeling, qualification, testing

• Is the exact same item (part number) advertised for sale?
  – Google Search the Product or Item
  – Check specialized websites such as military surplus & aviation parts resellers
  – BUT, are sufficient quantities available? What are the terms & conditions?

• Do similar items exist?
  – Check the commercial item database
  – Use research sites such as ones listed on CIG resource page

• Building a supported decision, reference to the 8 definitions
The DCMA Commercial Item Group is available to:

- Provide expert assistance to DoD buying commands
- Support DCMA offices in performance of CPSRs
- Provide training
- Work with contractors to streamline the buying process

Commercial@dcma.mil
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QUESTIONS/COMMENTS
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